IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NOS. 30, 31 AND 32 OF 2004

Shri Laxmikant D. Naik Karmali,
major of age, Civil Engineer,
having Office near St. Joaquim
Chapel, Borda, P.O. Fatorda,
Margao, Goa - 403 602. ... Appellant

versus

1. Shri Santosh V. Naik,
   major of age,
   Civil Contractor and
   Transport Operator,
   Second Floor,
   Cindio Apartments,
   Opposite Cemetery,
   P.O.Quepem, Goa.

2. State. ... Respondents

Mr. P. A. Kholkar, Advocate for the Appellants.

Mr. S. G. Bhobe, Advocate for the Respondent No.1.

Ms. W. Coutinho, Public Prosecutor for the Respondent No.2.

CORAM : N. A. BRITTO, J.

DATE :13TH & 21ST JULY, 2006.

ORAL JUDGMENT

These are Complainant's appeals against the acquittal of the accused under Section 138 of the Negotiable Instrument Act, 1881, ('*Act*' for short). There is no dispute that the accused had issued to the Complainant three blank cheques i.e. only signed by the accused with the remaining particulars unfilled by the Complainant. The details of the cheques are as follows:-

Cheque No. 867020 dated 20.04.1999 for Rs.50,000/-
(In C.C.no. 175/N/99/A).

Cheque No. 867021 dated 18.02.1999 for Rs.80,000/-
(In C.C. no. 131/N/99/E).

Cheque No. 867022 dated 24.02.1999 for Rs.60,000/-
(In C.C. no. 130/N/99/E).

2. There is no dispute that the Complainant is a Civil Engineer and the accused is a Contractor. There is also no dispute that the accused had engaged the Complainant as his consultant to appear on his behalf in an Arbitration case which the accused had with Mormugoa Port Trust, in which one P. V. Kandolkar, was the Arbitrator. There is also no dispute that

towards the said fees, the accused had paid a sum of Rs.10,000/- to the Complainant as part payment. Although the accused also claimed that he had paid another Rs.12,000/-, this is disputed by the Complainant. There is also no dispute in the said arbitration proceedings, an Award was made in favour of the accused in the sum of Rs.12,25,299/-, which amount the accused received on 12.01.1999 and the Complainant himself had filed the said Award before the Court at Vasco da Gama, as admitted by the Complainant, in one of the cases.

3. The complainant filed three separate complaints bearing the aforesaid numbers:

> C.C. no.130/N/99/E and C.C. no. 131/N/99/E were filed on 19.04.1999.
>
> C.C. no. 175/N/99/E, was filed on 20.05.1999.

4. In all the cases, it was the case of the Complainant that the accused had issued the said cheques, on the dates mentioned therein, drawn on State Bank of India, towards the payment of dues by the accused to the Complainant. The Complainant had then presented the said cheques

in his account in Corporation Bank at Aquem, Margao, on different dates. The cheque for Rs.80,000/- was deposited on 19.02.1999, for Rs.60,000/- on 24.02.1999 and for Rs.50,000/- on 20.04.1999. However, the cheques were returned dishonoured and after the statutory notice was served upon the accused, the receipt of which is not in dispute, the Complainant filed the said complaints.

5. In support of the complaint/s, the Complainant examined himself and the Bank Manager, where the Complainant was having his account and where he had deposited the cheque. The Complainant also examined the Bank Manager, where the accused was having his account. Although the Complainant had stated in his complaint that the said cheques were issued towards the payment of dues owed by the accused to the Complainant, without specifying what were the said dues, the Complainant in the course of his evidence stated that the Complainant had given a loan to the accused and towards the repayment of the said loan, that the cheques were issued by the accused. It was suggested to the Complainant, on behalf of the accused, that the said three cheques were given as a security for the payment of the arbitration fees, which the accused would be required to pay to the Complainant. It was also

suggested to the Complainant that the said fees would be 5% of the arbitration Award, when it was stated by the Complainant that the accused had agreed to pay 15% of the fees. In support of the said plea, the accused examined himself and also produced the bank pass book, amongst other documents, to show that he could not have been in need of borrowing any loan from the Complainant as he had with him as on 12.01.1999, a sum of Rs. 12,16,657/-, which was the amount paid to him, due on the Award, after deducting T.D.S.

6. The Complainant in his evidence before the Court stated that the accused had given the said cheques towards the loans, which was repayable to him and produced the relevant documents. Although the Complainant had himself filed the Award, he stated in one of the cases, that he did not know how much the accused had received on the said Award. The Complainant stated that the said amount of Rs.10,000/-, which he received as his consultation fees, was to be adjusted towards final fees. He further stated that the amount of the loan was disbursed by him on three occasions and besides the same, he had not given any other loan to the accused. He stated that the said disbursement was made about one or two months prior to the issuance of the cheques in question by the accused.

He stated that the cheques were issued on the dates appearing on the cheques. On the other hand, the accused examined himself and stated that the Complainant was engaged by him as his consultant before the arbitrator, the said Kanolkar, and it was orally agreed between them that he had to pay the Complainant 5% of the amount of the Award and the same was to be paid to the Complainant only after he had received the amount of the Award. He also stated that during the pendency of the said arbitration proceedings, he had issued the cheques in dispute to secure the payment of the Complainant's fees and the Complainant had also taken an amount of Rs.22,000/- from him, Rs.10,000/- by cheque and Rs.12,000/- by cash.

7. These are the broad facts stated by the Complainant and the accused.

8. As far as the law is concerned, it is well settled. The Apex Court in the case of **K. Bhaskaran** v. **Sankaran Vaidhyan Balan and another**((1999) 7 SCC 510/AIR 1999 SC 3764) has clearly stated that if the signature on the cheque is admitted to be that of the accused, the presumption envisaged in Section 118

of the Act can legally be inferred that the cheque was made or drawn for consideration on the date which the cheque bears. Section 139 of the Act enjoins on the Court to presume that the holder of the cheque received it for the discharge of any debt or liability and the burden is on the accused to rebut the aforesaid presumption. Again, the Supreme Court in the case of **Hiten P. Dalal** v. **Bratindranath Banerjee**(AIR 2001 SC 3897) has referred to Section 139 of the Act and has stated that this Section provides that "it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability". The effect of these presumptions is to place the evidential burden on the accused of proving that the cheque was not received by the Bank towards the discharge of any liability. The Supreme Court further observed that Sections 138 and 139 require that the Court "shall presume" the liability of the drawer of the cheques for the amounts for which the cheques are drawn, and that it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption had

been established. The Supreme Court has further observed that the obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non existence of the presumed fact. In other words, observed the Supreme Court, that if the facts required to form the basis of a presumption of law exists, no discretion is left with Court but to draw the statutory conclusion but it does not preclude the person against whom the presumption is drawn and from rebutting it and proving the contrary. The Supreme Court has further observed that the burden resting on the accused person in such a case would not be as light as it is where a presumption is raised under Section 114 of the Evidence Act and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one. The words "unless the contrary is proved" which occur in this provision makes it clear that the presumption has to be rebutted by proof and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence is

directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists and unless the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted. The aforesaid decision has been followed in the case of **Mohanan** v. **Bibhukumar**(2003(2) DCR 339) wherein the Kerala High Court has held that the burden on the accused has got to be discharged by preponderance of probabilities, as in a civil case. It is also stated that the presumption under Section 139 of the Act is available to all cheques and not only to cheques in the handwriting of the drawer. There cannot be any dispute as regards the said propositions.

9. On behalf of the Complainant, it has been submitted that the accused did not reply to the notice and, therefore, it has got to be presumed that the accused had admitted the liability and in this context reference was made to the case of **M/s. Jayam Company and another** v. **T. Ravichandran**(2003 (2) DCR 145) wherein the Madras High Court held that the non

compliance of the legal notice issued by the Complainant cannot so easily be overlooked since on receipt of a legal notice either without complying with the requirement of law in settling the amount within fifteen days on the receipt of such notice or even keeping quiet even without denying the allegations with a reply the only conclusion to be arrived at is that the accused is presumed to have admitted those which have been averred in the notice and that was a case of that nature wherein the accused had not only failed to settle the amount but also failed to issue a reply in time. In my view, the silence on the part of the accused in reply to a notice could at the most be taken as one of the circumstances against the accused.

10. As already stated, the Complainant did not state in the complaint that he had advanced a loan to the accused and towards the repayment of which the accused had issued the said cheques to him. What the Complainant averred in the complaint was that the cheques were towards the payment of dues owed by the accused to the Complainant and this averment appears to be more in tune with the plea of the accused rather than the case of

the Complainant that he had advanced any loan to the accused. The story of the Complainant that the Complainant had advanced a loan of Rs.1.90 on three different occasions has been sufficiently rebutted by the accused. First of all, it must be noted that the Complainant has admitted that the accused till date has not paid to the complainant his consultancy fees, and, the Complainant as a normal prudent man would have certainly taken some action towards the recovery of the consultancy fees payable to the Complainant in case they were required to be paid. The Complainant has stated in one case that the loan of Rs.50,000/- was given about one or two months prior to the date of the cheque in question. In the second case, the Complainant has stated that the loan of Rs.60,000/- was given about a month before the date of the cheque and in the third case, the Complainant has stated that to his memory the loan pertaining to the cheque of Rs.80,000/- was given about a month prior to the date of the cheque. Admittedly, the Complainant did not obtain any receipt from the accused when he disbursed the said amounts of the loans and in fact he has admitted that the cheque was the only document received by him. It appears that in each

case, the Complainant advanced the money and waited for a month or two to receive the cheques from the accused. The very fact that the cheques in question carry consecutive numbers, falsify such a story and suggest that they were given at one time as contended by the accused. There is no reason why the Complainant could not have obtained a receipt on each occasion for such large sums. The Complainant was appointed as a Consultant and it would be difficult to believe that the Complainant would have advanced a loan to his very client. The Complainant had stated that the accused was in need of money and that is the reason why he had lent money to the accused but this story of the Complainant was falsified by the accused by proving that on or about 13-1-1999 he was quite comfortable with the balance in his account of a sum of Rs.12,16,657/-. The learned J.M.F.C. observed, and in my view rightly, that the Complainant had failed to give the specific dates of giving details of the said loans. It is not the case of the Complainant that the total sum of Rs.1.90 lakhs was given by the complainant at one time and it appears that it is his case that the said amounts were given from time to time and about a month or two

prior to issuance of each of the cheques which story is again difficult to be believed. Although, the Complainant had himself stated that he had filed the Award in one case, in another case, the Complainant stated that the accused had not disclosed to him the final amount of the Award and this version has also been found to be unbelievable, and in my view rightly. On behalf of the accused, it is pointed out that the cheques for Rs.80,000/- and Rs.60,000/- were returned dishonoured on 6-3-1999 and 8-3-1999 respectively and if the said cheques were returned dishonoured on the said dates, the Complainant as a prudent man would not have accepted the cheque of Rs.50,000/- on 20-4-1999 and that too for a sum of Rs.50,000/-. It is pointed out on behalf of the accused that at the time of accepting the said cheque dated 20-4-1999 for Rs.50,000/- the Complainant as a prudent man would have insisted that the accused gave a cheque for the entire amount since two cheques for Rs.80,000/- and Rs.60,000/- were already dishonoured on 6-3-1999 and 8-3-1999 respectively. There is much force in the said contention, on behalf of the accused. The Complainant wanted the Court to believe that he advanced Rs.50,000/- a month prior

to 20-4-1999 inspite of the fact that the cheque for Rs.80,000/- and Rs.60,000/- were returned dishonoured on 6-3-1999 and 8-3-1999. The entire case of the Complainant that the said cheques were issued by the Complainant in repayment of loan/s given to the accused has been sufficiently demolished by the accused and it does appear that the accused gave the said cheques not because the Complainant had lent any money to the accused but towards the liability which the accused would incur towards the fees of the Complainant for appearing on behalf of the accused before the Arbitrator regarding which there is now no dispute. The fact that till date the Complainant has not initiated any proceedings for recovery of his consultancy fees confirms that conclusion.

11. On behalf of the Complainant a letter dated 21-12-1995 was produced to support the Complainant's case as regards the arbitration fees which the accused was to pay to the Complainant. According to the accused, the fees payable to the Complainant were 5% of the amount of the Award but according to the Complainant they were at the rate of 15% of the Award.

The accused stated that the said letter dated 21-12-1995 was issued by the accused. The accused has admitted his signature on the said letter Exh.PW1/G-D and it was suggested to the Complainant that the accused had signed a blank letter head and it was used by the Complainant and it was fabricated by the Complainant to extract money from the accused. On behalf of the Complainant, it is submitted that this letter Exh.PW1/G-D supports the case of the Complainant that the fees payable to the Complainant by the accused were 20%. It has further been argued on behalf of the Complainant that initially the fees payable were at 20% but were reduced at 15% by mutual agreement. In my view, this letter Exh.PW1/G-D does not help the case of the Complainant at all. Firstly, it must be observed that if the accused could give the Complainant blank signed cheques, and the Complainant even wrote one of the counterfoils of the said cheques, it is not difficult to believe that, as the Complainant was appearing on behalf of the accused, the accused might have given to the Complainant the said letter head in blank, signed by him. My attention is drawn on behalf of the accused to the said letter which gives an impression that

the contents have been compressed within the available space. The contention on behalf of the Complainant that the fees were initially agreed at 20% and then reduced to 15% cannot at all be accepted. The Complainant did not whisper a word in his evidence that the agreed fees were at 20%. In the course of his evidence the Complainant stated that the fees payable were 15% and it is much at a later stage, and that too in one of the cases the Complainant himself had objected to produce the said letter, that the Complainant came with the said letter which shows that agreed fees were at 20%. In other words, the said letter which mentions the fees of 20% does not support the Complainant's statement that the fees payable were 15% and this is yet another reason why the said letter has to be considered to be fabricated. The accused had sufficiently disproved the case of the Complainant, with his own evidence as well.

12. Having realized this situation that the Complainant had failed to prove that the cheques were issued by the accused towards the payment of the loan/s advanced by the Complainant, on behalf of the Complainant, it is submitted that even if the

cheques were issued by the accused towards security towards the payment of consultancy fees still Section 138 of the Act would be attracted. On behalf of the Complainant, reference was made to the case of **M/s Balaji Seafoods Exports(India) Ltd. and another** v. **MAC Industries Ltd**. (1(1999) BC 298) on which reliance was placed by the learned trial Court, and, it has been submitted that the view held therein that the cheque handed over as security created no liability under Section 138 of the Act is not a correct view. It is submitted on behalf of the Complainant that that view is incorrect in the light of the decision of the Apex Court in the case of **I.C.D.S. Ltd.** v. **Beemna Shabeer and another**(AIR 2002 SC 3014).

13. The Supreme Court in this case has held as incorrect the view that when a cheque is issued as security no complaint will lie under Section 138 of the Act. The Supreme Court observed that the language of the Section has been rather specific as regards the intent of the Legislature. The commencement of the Section stands with the words "where any cheque", the words are of extreme significance, in particular, by

reason of the user of the words "any" the first three words suggest that in fact for whatever reason if a cheque is drawn on an account maintained by him with a banker in favour of another person for the discharge of any debt or other liability, the words any debt or other liability if read with the first three words at the commencement of Section 138 leave no manner of doubt that for whatever reason it may be, the liability under this provision cannot be avoided in the event the same stands returned by the banker unpaid. The Legislature has been careful enough to record not only discharge in whole or in part of any debt but the same includes other liability as well.

DATE: 21ST JULY, 2006.

14. On behalf of the Complainant, therefore, it is submitted that since as per the accused himself the cheques were issued as a security for the payment of the consultancy fees of the Complainant, the accused cannot avoid liability on the same. It is submitted that the accused thus became a debtor after he received the Award amount and hence provisions of

Section 138 of the Act are attracted. It is further submitted that the admission on the part of the accused makes the offence complete.

15. It is further submitted that the powers of the Court under Section 138 of the Act are limited only to verifying whether there exists a liability or not and the powers of the Court do not cover the question of deciding the type of liability i.e. whether it is of the type as admitted by the accused or of the type as stated by the Complainant and that this task would come under civil jurisprudence and not under criminal jurisprudence. Reliance has been placed on the case of **Mohanan** v. **Bibhukumar**(supra) wherein it is held as follows:-

> "In the absence of compelling reasons it has to be assumed that the cheque was not a blank cheque when it was handed over. A person so handing over a blank cheque must be assumed to have given implied authority to such person to whom the cheque is handed over to fill up the relevant details. The entries made in the

> cheque under such authority cannot normally amount to material alterations also. Merely because the entries are in the handwriting of another, the cheque will not cease to be cheque or a bill of exchange. The presumption under Section 139 of the Negotiable Instruments Act is available to all cheques and not only to the cheques in the handwriting of the drawers".

16. It is further submitted that the accused has rebutted the presumption to the extent of the type of the liability stated by the Complainant but he has admitted that the liability is of a different type i.e. towards security payment of arbitration fees and since the respondent has admitted the liability, though of a different type, then of the type stated by the Complainant, the accused is liable to make the payment of the cheque amount in view of the case of **I.C.D.S. Ltd.** v. **Beemna Shabeer and another**(supra). Reliance has also been placed on the Judgment of the Apex Court in the case of **Goaplast(P) Ltd.** v. **Chico Ursula D'Souza**(2004(2) SCC 235).

17. On the other hand, it is submitted on behalf of the Complainant, that the Complainant abandoned the letter dated 21-12-1995-Exh.PW1/G-D to state that his fees were to be calculated at 15% of the Award amount which shows that the Complainant has falsified his own case and, therefore, the version of the accused that the fees were to be paid at 5% looks to be more probable and will have to be accepted. It is further submitted that the Complainant came to the Court with a completely false case and also manipulated documents like letter dated 21-12-1995. It is submitted that if the three cheques were given in blank as security for the payment of fees of the Complainant in the year 1995, then it follows that there was no liability in favour of the Complainant, i.e. the liability if any being contingent in nature in that it would come into being only after the Award was passed and in case the accused had lost the arbitration case there would be no fees payable. It is further submitted that assuming the liability came to be crystallized after the Award was passed on 12-7-1996, the Complainant would be at the highest entitled to fill in the cheques by

implication so as to cover 5% of the amount of the Award as his fees which comes to Rs.62,265/- out of which admittedly the Complainant received Rs.10,000/-, though the case of the accused is that the accused paid Rs.22,000/- thus leaving a balance of Rs.52,265/. It is submitted that all the three cheques could be filled in an aggregate amount i.e. Rs.62,265/- and if each of the cheques were to be filled they could not be for an amount of more than Rs.17,421/-. It is submitted that the cheques have been filled in by the Complainant for amounts which were unauthorized and, therefore, the accused cannot be held liable under Section 138 of the Act. It is further submitted that it is not the case of the Complainant that the cheques were filled in by him to cover his fees and it is also not his case that the fees were to be calculated at 5% or that any particular date was agreed to be put on the cheques so as to cover the fees as on that date and these aspects were not even put up to the accused by the Complainant while the accused was under cross-examination. It is submitted that the cheques were not

issued towards any liability at the time they were issued and at the time they were issued there was no crystallized liability. It is further submitted that assuming the liability got crystallized later and the cheques were issued in blank with an implied authority to the Complainant to fill the same, then at the highest it could be said that the Complainant was authorized to fill in with an amount at the highest of 5% minus Rs.10,000/- already paid to the Complainant which had to be divided over the three cheques.

18. As already stated, the Complainant came with a case before the Court that the three cheques were given by the accused to the Complainant in discharge of the liability of the loan amounts given by the Complainant to the accused. I have already concluded that the Complainant has failed to prove such a case even with the aid of presumption available under the Act in his favour. In other words, the accused has been able to establish by balance of probabilities that the said cheques were not issued to the Complainant in discharge of any liability

towards any loan taken by the accused from the Complainant but indeed were given as security towards the consultancy fees which the accused would be required to pay to the Complainant.

19. In my view, the case of the Complainant cannot be accepted for two reasons. Firstly, the Complainant having come to the Court with a specific case that the Complainant had advanced loans to the accused and the accused having given the Complainant the said cheques towards the repayment of the said loans and the Complainant having failed to prove that he had given the said loans even with the aid of the presumptions in his favour, the Complainant's case deserved to be dismissed since otherwise it will only help dishonest Complainants to come to the Court with falsehood. Since the Complainant's case is of criminal nature, it is for the Complainant to prove his case on his strength and not on the weakness of defence. Secondly, the Complainant has failed to prove that there was any debt or liability on the part of the accused to the extent of Rs.1.90 lakhs towards fees payable by accused. There is no dispute that the amount of the Award was Rs.12,45,299/-. As per the

Complainant the consultancy fees were fixed at 15% and presumably the Complainant completed the cheques in his own handwriting assuming that 15% of the amount of the Award would work out to Rs.1.90 lakhs. However, 15% of Rs.12,45,299/- works out to Rs.1,86,794-85. As per the accused 5% of the amount of the Award works out to Rs.62,264.95. The Complainant's case that the Complainant and the accused had agreed to pay to the Complainant consultancy fees at the rate of 15% cannot be accepted. As already stated the Complainant first stated that the fees agreed upon were 15% and in support of that came with the said letter showing that the fees agreed were 20%. In view of the conflicting statements, one oral and the other in writing, the Complainant's contention that the agreed fees were 15% cannot be accepted. On the contrary, on the balance of probabilities, it is the case of the accused which has got to be accepted and that is that the consultancy fees agreed upon between Complainant and the accused were at 5% and which works out to Rs.62,264.95. Firstly, the Complainant has not explained if 15% of the fees works out to Rs.1,86,794.85 as to on what basis he filled in the suit cheques in the aggregate

amount of Rs.1.90 lakhs. It is certainly not the case of the Complainant that the fees were payable not on the amount of the Award as made by the Arbitrator but on the amount which would become due after the Award was made rule of the Court. Once, it is accepted that the liability of the accused towards the Complainant was Rs.62,264.95 out of which Rs.10,000/- were already paid it follows that the Complainant had no implied authority to fill in the cheques for an amount of more than Rs.52,264.95. In other words, the suit cheques represent an amount of Rs.1.90 lakhs which was not at all the debt or the liability of the accused towards the Complainant and, therefore, it could not be said that the suit cheques were issued by the accused to the Complainant towards debt or a liability. It is well settled that when a cheque is for an amount more than due by the accused, Section 138 of the Act is not attracted. In this context, reference could be made to a decision of this Court in **M/s. Pawan Enterprises** v. **Satish H. Verma**(2003 CRI.L.J. 2146) wherein the cheque was for an amount of Rs.17,745/- and it was undisputed that what was due by the accused was only

Rs.10,975/- and, therefore, the Court held that it could not be said that the cheque was issued for discharging the liability to the extent of Rs.17,745/- when what was due was only Rs.10,975/-.

20. In the light of the above, I find there is no merit in these appeals. Consequently, the same are hereby dismissed.

N. A. BRITTO, J.

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